CAUSE NO. 14,383

JIMMY WEAVER, ET UX JANNETTE WEAVER	§	IN THE DISTRICT COURT
VS.	§	FOR
EMPLOYER'S UNDER-WRITERS, INC., MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING, AND LISA ELLIOTT	§	TYLER COUNTY, TEXAS ____ JUDICIAL DISTRICT

PLAINTIFFS ' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, JIMMY WEAVER and JANNETTE WEAVER, hereinafter referred to as "Plaintiffs," complaining of and against EMPLOYER'S UNDERWRITERS, INC., Defendant, an Alabama Corporation, MALCOLM RODRIGUES, Individually and d/b/a RODRIGUES LOGGING, Defendant, and LISA ELLIOTT, Defendant, and would show the Court as follows:

I.
PLAINTIFFS

Plaintiffs are residents of Tyler County, Texas.

II.
DEFENDANTS

Defendant, EMPLOYER'S UNDERWRITERS, INC., may be served with process through its registered agent, C. T. Corporate Systems, at 350 N. St. Paul Street, Dallas, Texas 75201. Defendant, MALCOLM RODRIGUES, may be served with process at P.O. Box 631396, Nacoqdoches, Texas 75963 and Defendant, LISA ELLIOTT,

may be served with process at P. O. Drawer B, Decatur, Alabama 35602-9002.

III.
VENUE

Venue is proper in Tyler County, Texas pursuant to Section 15.032 of the Texas Civil Practices and Remedies Code.

IV.
DEFINITIONS AND STATUTORY ASSERTIONS

Plaintiffs are "consumers" as defined in the Texas Business and Commerce Code, Section 17.45(4), a part of the Deceptive Trade Practices Consumer Protection Act, hereinafter referred to as "DTPA."

Plaintiffs and Defendants are "persons" as that term is defined under DTPA, Section 17.45(3).

The term "knowingly" as used herein shall mean actual awareness of the falsity, deception or unfairness of the Act or practice giving rise to the Plaintiffs' Claim. In this regard Plaintiffs would show that the acts or practices of the Defendants complained of herein and as hereinafter alleged were committed "knowingly."

"Unconscionable action or course of action" as used herein shall mean an act or practice, which to a person's detriment takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree. In this regard, Plaintiffs would show that the acts or omissions of the Defendants as herein stated constitute an unconscionable action or course of action.

The "acts or omissions" hereinafter alleged were taken or made on behalf of Defendants by and through their respective duly authorized agents, servants or employees within the course and scope of their employment.

Defendants are "persons" as that term is defined in Article 21.21, Section 2(a), of the Texas Insurance Code.

The term "knowingly" as used herein shall also mean actual awareness of the falsity, deception or unfairness or deception of the

act or practice made the basis for a claim for damages under Section 16 of Article 21.21 of the Texas Insurance Code.

Plaintiffs are persons entitled to seek relief under Section 16 of Article 21.21 of the Texas Insurance Code, Unfair Competition and Unfair Practices.

Plaintiffs have complied with notice provisions of the Texas Civil Practice and Remedies Code, Section 38.002.

In addition to all other allegations, Plaintiffs assert that Article 38.001 of the Texas Civil Practice and Remedies Code is applicable to this case under the theory of implied contract.

V.

FACTS

Plaintiff, JIMMY WEAVER, was employed by MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING as a chain saw operator. On or about October 6, 1990 while he was working in the course and scope of his employment for Defendant, MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING, Plaintiff, JIMMY WEAVER, was struck in the back and neck by a falling tree causing him to be totally and permanently disabled and causing him injury, damage and loss. Defendant, MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING, maintained accident and disability insurance coverage for the benefit of his employees including Plaintiff, JIMMY WEAVER, with the Defendant, EMPLOYER'S UNDERWRITERS, INC. At the time Plaintiff, JIMMY WEAVER, sustained the aforementioned injuries, the Defendant, MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING, was a nonsubscriber under the Texas Workers' Compensation Act.

On or about October 23, 1991 LISA ELLIOTT, acting in the course and scope of her agency or employment for Defendant, EMPLOYER'S UNDERWRITERS, INC., in order to induce Plaintiffs to release her employer, the Defendant, EMPLOYER'S UNDERWRITERS, INC., made false, misleading and deceptive representations to Plaintiffs, including, but not limited to, a representation that "$2,700.00 was all the money that Plaintiffs were going to receive. Deceived by the representations made to them by

the said LISA ELLIOTT, Plaintiffs executed the Settlement Agreement, Exhibit A hereto. Since the execution of the Settlement Agreement, Exhibit A hereto, by Plaintiffs on October 23, 1991, Defendant, EMPLOYER'S UNDERWRITERS, INC., has refused to pay the reasonable expense incurred by Plaintiff, JIMMY WEAVER, for the medical care necessary as a result of his injury on October 6, 1990. In addition, since October 23, 1991 Defendant, EMPLOYER'S UNDERWRITERS, INC., has refused to pay to Plaintiffs the disability benefits due Plaintiffs under the contract of insurance issued by Defendant, EMPLOYER'S UNDERWRITERS, INC., to Defendant, MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING, for the benefit of his employees including Plaintiff, JIMMY WEAVER.

VI.

CAUSES OF ACTION

Plaintiffs hereby incorporate all previous factual allegations in the following statement of their causes of action:

A. DTPA AND UNFAIR COMPETITION AND UNFAIR PRACTICES ALLEGATIONS

Defendants, EMPLOYER'S UNDERWRITERS, INC., and LISA ELLIOTT, in representing to Plaintiffs that $2,700.00 was all of the money that they were ever going to receive and that if they took their claims for the injury of Plaintiff, JIMMY WEAVER, to court, they would not receive more than $2,700.00 and might receive much less were false, misleading and deceptive acts and practices, specifically violating DTPA Section 17.46 et seq in various respects. Plaintiffs would show that the acts or practices of Defendant, EMPLOYER'S UNDERWRITERS, INC., MALCOLM RODRIGUES and LISA ELLIOTT as herein alleged were committed "knowingly." Plaintiffs would further show that the acts and omissions of these Defendants were and are a producing cause of damages to Plaintiffs. Plaintiffs would further show that Defendants, EMPLOYER'S UNDERWRITERS, INC., MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING and LISA ELLIOTT as set forth above engaged in actions, or in a course of action which

constituted an "unconscionable action or course of action" for which Plaintiff is entitled to recover damages under DTPA Section 17 . 50 and for which damages Plaintiffs sue. Further, by virtue of violation of various provisions of DTPA Section 17.46 by Defendants, EMPLOYER'S UNDERWRITERS, INC., MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING and LISA ELLIOTT, Plaintiffs are entitled to recover under the provisions of Article 21.21, Section 16, Texas Insurance Code, for which additional relief Plaintiffs herein sue. Settlement offer made Plaintiffs by Defendants was grossly inadequate in the circumstances and each of Defendants, EMPLOYER'S UNDERWRITERS, INC., MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING and LISA ELLIOTT, were aware of the inadequacy of the settlement offer and the deception inherent in its offer to Plaintiffs in the circumstances that then existed.

B. CONSTRUCTIVE FRAUD ALLEGATIONS

When Defendants, EMPLOYER'S UNDERWRITERS, INC., MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING and LISA ELLIOTT, represented to Plaintiffs that unless Plaintiffs accepted Defendants' offer of settlement in the amount of $2,700.00 Plaintiffs would in all probability receive nothing or far less than the $2,700.00 offered, Defendants fully intended that Plaintiffs would rely upon these representations to Plaintiffs' detriment and the advantage of Defendants. Defendants knew that the sum of $2,700.00 was grossly unfair in the circumstances and represented to Plaintiffs that the sum was fair and adequate and all that they would receive and that they might receive much less in order to induce Plaintiffs to accept $2,700.00 in settlement of all of their claims and causes of action against Defendants. Plaintiffs would show that the representations by Defendants were material and false and as a result of their reliance upon such representations Plaintiffs have been damaged as hereinafter alleged. Plaintiffs would show that the acts and omissions of Defendants as alleged in this paragraph constitute actionable fraud for which Plaintiffs are entitled to recover their damages as herein alleged. Each of the Defendants was aware of the inadequacy of the settlement offer and of the deception inherent in its presentation to

Plaintiffs. Each of the Defendants knew, or should have known by the exercise of ordinary care, about the deceptions being practiced upon Plaintiffs by the other Defendants.

C. DURESS

Plaintiffs would show that the action of Defendants, EMPLOYER'S UNDERWRITERS, INC., MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING and LISA ELLIOTT, in representing that the $2,700.00 offer was a fair offer and that unless said sum was accepted by Plaintiffs, Plaintiffs would receive far less, if anything at all at a time when Plaintiffs were financially destitute, were uneducated and were without legal representation in a matter having vast legal implications for them created an imbalance of bargaining power between Plaintiffs and Defendants. As a result of the acts and omissions described herein, Defendants have employed extortionate measures in obtaining Plaintiffs' agreement to settle their claims and causes of action against Defendants for $2,700.00. Plaintiffs would show that the implied threat made by Defendants against Plaintiffs that unless Plaintiffs accepted the $2,700.00 they would receive little, or nothing at all, Eor their claims for the serious bodily injury of Plaintiff, JIMMY WEAVER, destroyed Plaintiffs' free agency, if any they had. Plaintiffs would show that the acts and omissions of Defendants as alleged herein constitute duress, economic coercion and business compulsion which have damaged Plaintiffs as hereinafter alleged. Each of Defendants was aware of the inadequacy of $2,700.00 in exchange for all of the claims and causes of action against Defendants possessed by Plaintiffs as the result of the injury of Plaintiff, JIMMY WEAVER, on October 6, 1990. Each of Defendants knew, or should have known, by the exercise of ordinary care about the duress being practiced upon Plaintiffs by the other Defendants in this action.

D. BAD FAITH ALLEGATIONS

Plaintiffs would show that Plaintiff, JIMMY WEAVER, was a third party beneficiary of a contract between Defendant, EMPLOYER'S UNDERWRITERS, INC. and Defendant, MALCOLM RODRIGUES, so that Defendant, EMPLOYER'S

UNDERWRITERS, INC., owed to Plaintiff, JIMMY WEAVER, the duty of good faith and fair dealing. Defendants, EMPLOYER'S UNDERWRITERS, INC. and LISA ELLIOTT, in dealing with Plaintiffs as described herein breached the duty of good faith and fair dealing owed to Plaintiffs by Defendant, EMPLOYER'S UNDERWRITERS, INC., its agents, servants and employees including, but not limited to, Defendant, LISA ELLIOTT. Failure by Defendants to deal with Plaintiffs in good faith and with fairness was a producing cause of injury, loss and damage to Plaintiffs, all as hereinafter more specifically alleged. Defendants knew, or should have known by the exercise of ordinary care, of their duty to deal with Plaintiffs in good faith and with fairness and additionally knew, or should have known, by the exercise of ordinary care of the inadequacy and inherent deception of an offer of $2,700.00 for settlement of all of the claims and causes of action of Plaintiffs against Defendants. Each Defendant knew, or should have known by the exercise of ordinary care about the breach by the other Defendants of the duty of good faith and fair dealing owed Plaintiffs by Defendants.

E. CONSPIRACY ALEEGATIONS

Plaintiffs would show that Defendants, and each of them, acted in active concert with respect to the acts and omissions described herein and are jointly and severally liable to Plaintiffs for Plaintiffs' damages, as hereinafter set forth. Each of the Defendants was aware of the inadequacy of the settlement offer and of the deception inherent to such an offer to Plaintiffs in the then existing circumstances. Each Defendant knew, or should have known by the exercise of ordinary care, about the inherently deceptive misleading practices being utilized against Plaintiffs by the other Defendants.

E. NEGLIGENCE

Defendant, MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING, failed to provide Plaintiff, JIMMY WEAVER, a safe place in which to work and failed to provide Plaintiff, JIMMY WEAVER, equipment adequate to insure his safety in the workplace which failures were negligence and were proximate causes of

Plaintiffs' injury, losses and damages.

Defendants, EMPLOYER'S UNDERWRITERS, INC. and LISA ELLIOTT, failed to deal with Plaintiffs in good faith and with fairness which failure was negligence and was a proximate cause of Plaintiffs' injuries, losses and damages.

F. GROSS NEGLIGENCE

Defendants' acts and omissions as described herein amount to more than momentary thoughtlessness, inadvertence, or error in judgment and establish an entire want of care on the part of Defendants so as to establish that Defendants' acts and omissions in dealing with Plaintiffs were the result of actual conscious indifference to the rights, welfare and safety of Plaintiffs and of Plaintiff, JIMMY WEAVER in particular. Alternatively, Plaintiffs would show that Defendants, and each of them, acted intentionally and with malice to deprive Plaintiffs of their claims and causes of action against Defendants.

In breaching their implied duty to deal with Plaintiffs in good faith and with fairness Defendants, and each of them, acted with fraud, oppression and malice. Plaintiffs are therefore entitled to recover an amount that the Jury may in its discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that the Jury may have found as actual damages.

G. ATTORNEY FEE ALLEGATIONS

As a result of the acts of Defendants as set forth herein Plaintiffs have been required to employ the undersigned attorneys and have agreed to pay the undersigned attorneys a reasonable fee for their services in bringing this litigation, including all reasonable and necessary out-of-pocket expenses. Plaintiffs are entitled to recover from Defendants, jointly and severally, their reasonable attorney's fees and costs of court in the prosecution of this action, pursuant to Provisions of Section 38.001 et seq, Texas Civil Practice and Remedies Code, DTPA, Section 17.50 and Texas Insurance Code, Article 21.21, Section 16.

VII.
DAMAGES

As a result of the acts and omissions as hereinabove alleged, Plaintiffs have been damaged in the following sums, for which sums Plaintiffs hereby sue:

I. For Plaintiffs' actual damages, being a sum of not less than One Million Dollars, being the difference between the amount of $2,700.00 and the amount Plaintiffs allege to be adequate compensation under the terms and provisions of the policy issued to Defendant MALCOLM RODRIGUES d/b/a RODRIGUES LOGGING, by Defendant, EMPLOYER'S UNDERWRITERS, INC.; and the loss of income that would have been generated from an adequate settlement;

II. For mental suffering, pain and anguish in a sum of not less than Five Hundred Thousand Dollars;

III. For treble damages as provided by DTPA, Section 17. 50;

IV. For the additional damages provided by Article 21.21, Section 16 of the Texas Insurance Code;

V. For punitive damages of not less than One Million Dollars;

VI. For mental anguish in an amount of Five Hundred Thousand Dollars;

VII. For Plaintiffs' reasonable and necessary attorneys fees and costs of court as provided in Texas Civil Practice And Remedies Code, Section 38.001, et seq, DTPA, Section 17.50 and Article 21.21, Section 16 of the Texas Insurance Code. Alternatively Plaintiffs plead for a reasonable and necessary attorney fee in an amount that is one-third (1/3) of any judgment entered herein.

VIII. PRE-JUDGMENT INTEREST. Plaintiffs further assert that they are entitled to recover pre-judgment interest on all the sums recovered, computed in accordance with the Cavnar decision of the Supreme Court of Texas, and for which additional relief Plaintiffs herein sue.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray and request that upon hearing hereof Plaintiffs have their damages and relief as hereinabove alleged, that Plaintiffs be awarded their costs of suit, and that Plaintiffs have pre-judgment and post-judgment at the legal rates; and that Plaintiffs be awarded such other and further relief, at law or in equity, to which they may show themselves justly entitled.

Respectfully submitted,

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ROEL NABORS, PRESIDENT
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1004 4TH AVENUE, S.E.
P. O. DRAWER B
DECATUR, AL 35602-9002

OFFER FOR FULL, FINAL, AND COMPLETE SETTLEMENT

I, Jimmy Weaver, hereby offer to accept a lump sum of $2,700.00 which represents the balance payable for any permanent partial disability as a result of accidental bodily injury sustained by me on or about October 6, 1990.

I hereby agree that my endorsement on a check which you will send me in the amount of $2,700.00 will constitute full, final, and complete settlement of any and all claims arising out of the said injury except for medical expenses, if any.

I am signing this agreement and asking that you send the above mentioned check by return mail.

SIGNED: /S/ Jimmy Weaver DATE: 10-23-91

WITNESS: /S/ Janette Weaver DATE: 10-23-91

ON-THE-JOB ACCIDENT SPECIALISTS

Exhibit A
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